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No. 84-1537

In The

Supreme Court of the United States

October Term 1984

EDUCATIONAL BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether ten charges of possession of an obscene film with intent to rent, tried in a single trial, resulting in ten separate convictions and punishments for the rental of ten different films is consistent with the constitutional guarantees against double jeopardy.

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OPINION BELOW

On January 29, 1985, the Supreme Court of Virginia, upon consideration of the record of the case and the arguments submitted by counsel involving the issue presently before this Court, refused the petition for appeal. (App. 1). The court held that there was no reversible error in the judgment complained of.[1]

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[1] Refusal of a petition for appeal constitutes a judgment on the merits. *Saunders* v. *Reynolds,* 214 Va. 697, 204 S.E.2d 421 (1974); *see Stillwell* v. *Commonwealth,* 219 Va. 214, 226 n.4, 247 S.E.2d 360, 368 n.4 (1978).

JURISDICTION

The petitioner asserts that jurisdiction of this Court lies pursuant to 28 U.S.C. §1257(3). The final order denying the petition for appeal in this case was entered by the Supreme Court of Virginia on January 29, 1985.

CONSTITUTIONAL AND VIRGINIA STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision is the Fifth Amendment to the Constitution of the United States. The applicable statutory provisions are §§ 18.2-372 through 18.2-374 of the Code of Virginia (1950), as amended. These code sections are provided in their entirety in the appendix to this Brief in Opposition at (Resp. App. 1-2).

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. —)." References to the appendix of the Petition will be designated "(App. —)." The appendix to the Brief in Opposition will be referred to as "(Resp. App. —)." Any references to the trial record of the case will be designated "(R. —)." Citations to the trial transcript will refer to the transcript of December 7, 1983 and will be indicated by "(Tr. ____)." All statutory provisions, unless otherwise noted, refer to the Code of Virginia (1950), as amended.

STATEMENT OF THE CASE

Petitioner was tried before a jury on December 7, 1983, and convicted on all counts of a ten count indictment for knowingly possessing an "obscene item" with the intent to rent, in violation of § 18.2-374(4). The jury imposed the

maximum fine for each of the ten counts. The trial court denied the petitioner's post-conviction motions and imposed the jury's verdict. The Supreme Court of Virginia denied the petition for appeal on January 29, 1985, and thereby affirmed the convictions.

STATEMENT OF FACTS

In August of 1983, an investigator with the Fairfax County Police Department visited petitioner's premises (Educational Books) in Fairfax County, Virginia. The investigator viewed ten different films located in various projection booths throughout the store. A search warrant was issued and the films were seized pursuant to the investigator's report and subsequent to a magistrate's independent review of the films at the store on August 17, 1983. (Tr. 42-43).

Each of the ten films seized pursuant to the warrant was located in a coin/token movie viewing booth on petitioner's premises. Each film was advertised by a placard on the specific movie booth in which the film was set up for viewing. The advertisement described the specific type of sexual acts depicted in the film. Each independently titled film was found to be distinct, containing different individuals in different settings engaging in a variety of acts. (Tr. 36, 43-46). The jury found that each of the ten films violated § 18.2-374(4). (R. 31-40).

REASONS FOR DENYING THE WRIT

I.

The Principles Protecting the Defendant Against Double Jeopardy Have Not Been Violated in the Instant Case.

On December 7, 1983, in a single trial, the petitioner was convicted of ten separate violations of § 18.2-374(4). The

jury recommended the maximum fine on each count and the trial court accordingly imposed the sentence. Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was violated when the Commonwealth charged, and the jury convicted and punished on ten separate violations of a single statute. This claim is erroneous under traditional double jeopardy principles and the consistent legal analysis provided by this Court.

The ten offenses involved are not the "same offense" irrespective of any interpretation of the applicable Virginia statute. The instant case involved ten different films which were set up in different coin operated viewing booths throughout petitioner's store. These films necessarily had to be viewed independently by customers. The films differed in title, content, participants, quality, etc. . . . and were separate and distinct "obscene items". (R. 1-4, 31-40). The particular use of each was a separate violation of Virginia law. *See* § 18.2-374(4).

The Fifth Amendment, applicable to state proceedings through the Due Process Clause of the Fourteenth Amendment, provides that no person shall be twice placed in jeopardy of life or limb for the same offense. There are three separate guarantees assured by the constitutional prohibition against double jeopardy; however, only one of these guarantees applies to a situation involving a single trial, such as the case at bar. *See Justices of Boston Municiple Court* v. *Lydon,* —— U.S. ——, ——, 104 S.Ct. 1805, 1813 (1984); *Illinois* v. *Vitale,* 447 U.S. 410, 415 (1980); *Whalen* v. *United States,* 445 U.S. 684 (1980); *Blythe* v. *Commonwealth,* 222 Va. 722, 284 S.E.2d 796 (1981). The petitioner's convictions occurred as a result of a single trial and the role of the constitutional guarantee is limited to assuring that the court

does not exceed its legislative authorization by imposing multiple punishments for the same offense. *Brown* v. *Ohio,* 432 U.S. 161, 165 (1977); *Turner* v. *Commonwealth,* 221 Va. 513, 530, 273 S.E.2d 36, 46-47 (1980). The question as to constitutionally permissible punishments is no different from the question of what punishments the legislature intended to be imposed. *Whalen,* 445 U.S. at 698 (Blackmun, J., concurring); *Blythe,* 222 Va. at 725-726, 284 S.E.2d at 798.

The petitioner states that *Blockburger* v. *United States,* 284 U.S. 299 (1932) is dispositive regarding the applicability of double jeopardy to the instant case. The *Blockburger* test espoused by petitioner (Ptn. 6) was devised by this Court to determine Congressional intent and relates to whether the defendant's right against double jeopardy is violated when the same act or transaction constitutes a violation of *two distinct statutory provisions.* Thus, the *Blockburger* test of whether there are multiple offenses or merely a single offense relates to situations involving two statutory provisions. It is inapplicable in the present case because the petitioner was tried in a single trial pursuant to a ten count indictment alleging ten separate violations of a single statute. This Court did not apply the test in the first issue in *Blockburger* where only one statute was involved. *See Blockburger,* 284 U.S. at 304.

The guarantee against multiple punishments for multiple violations of the "same offense" should not be construed to be a guarantee against multiple punishment for multiple violations of the same statute. *See United States* v. *Johnson,* 612 F.2d 843, 846 n.2 (4th Cir. 1979). Further, *Blockburger* is merely one tool designed for determining legislative intent. It is not the *Blockburger* test but legislative intent which controls. *See Missouri* v. *Hunter,* 459 U.S. 359 (1983).

II.

Legislative Intent Controls With Regard to Multiple Punishments and the Virginia Supreme Court Has Ruled as a Matter of State Law That Each Item Constitutes a Separate Violation Warranting Separate Punishment.

The single trial situation limits the double jeopardy consideration to assuring that the legislative authorization to impose multiple punishments is not exceeded. The legislative intent behind the statute is controlling. *Hunter,* 459 U.S. 359; *Ohio* v. *Johnson,* ___ U.S. ___, 104 S.Ct. 2536 (1984). This Court has consistently held that a state court is the final authority with regard to interpretation and reinterpretation of its state's legislation. Further, the Court has held that it is bound by this interpretation and will not substitute its judgment for that of the state court's construction of state statutory provisions. *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *see Brown,* 432 U.S. at 167.

The Supreme Court of Virginia has interpreted § 18.2-374, the statutory provision at issue in the instant case, as prescribing multiple punishments for multiple violations of the same statute. *See KMA, Inc.* v. *City of Newport News,* 228 Va. ———, ———, 323 S.E.2d 78, 83 (1984). That court, in a case involving this petitioner, the statute at bar and the issue presented to this Court, held that the *Blockburger* test does not apply to situations involving multiple violations of a single statute. *Educational Books, Inc.* v. *Commonwealth,* 228 Va. ———, ———, 323 S.E.2d 84, 85 (1984). *Cf. Kelso* v. *Commonwealth,* 226 Va. 197, 308 S.E.2d 104 (1983); *Fitzgerald* v. *Commonwealth,* 223 Va. 615, 635, 292 S.E.2d 798, 810 (1982), *cert. denied,* 459 U.S. 1228 (1983). The case involved a situation where the defendant was convicted in a single trial for nine violations of § 18.2-374(3). Nine obscene magazines were purchased

from the defendant by two Fairfax County Police investigators in two separate sales. The petitioner raised identical arguments as in the instant case. The Supreme Court of Virginia affirmed the convictions indicating that there was no double jeopardy violation and that legislative intent to provide multiple punishments was controlling. The court further held that § 18.2-374 prohibits the sale of "any obscene item" and thus the gravamen of the offense is the sale of a single obscene item, not the number of sales. Since the Commonwealth was required to prove obscenity beyond a reasonable doubt as to each item (magazine) introduced into evidence and the jury was required to apply the same legal principles to nine different sets of evidentiary facts to determine whether each was obscene, each sale of each item constituted a separate punishable offense. Thus, even under the "same evidence" test, there were nine separate offenses. *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86.

The case at bar is substantially identical to *Educational Books.* The court's decision regarding the legal issue is controlling as is its interpretation of the legislative intent of the Virginia General Assembly. It is dispositive in the instant case. In this case the "obscene item" involves ten obscene films rather than nine obscene magazines. Subsection (4) under § 18.2-374 prohibits a person from knowingly having in his possession with intent to rent "any obscene item". Subsection (3) of the statute, construed in *Educational Books,* prohibits the sale of "any obscene item." The Supreme Court of Virginia interpreted the statutory language of § 18.2-374 as showing "unmistakable legislative intent that the sale of each obscene magazine shall constitute a separate offense". *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86. The court's construction of the statute must be applied in the situation involving renting ten different films. The Common-

wealth was responsible for proving that each of the specific films was obscene and that petitioner violated § 18.2-374(4) with regard to each film. Different evidence (i.e. each separate film) was necessary to prove each violation. The jury was asked to make an independent determination whether ten separate items were obscene. Ten separate convictions were warranted and ten punishments were properly imposed. (R. 31-40). *See Gavieres* v. *United States,* 220 U.S. 338 (1911); *Jones* v. *Commonwealth,* 218 Va. 18, 235 S.E.2d 313 (1977); *Miles* v. *Commonwealth,* 205 Va. 462, 138 S.E.2d 22 (1964).

If this Court chooses to reject the Supreme Court of Virginia's analysis that the *Blockburger* test does not apply, it must still accept the Supreme Court of Virginia's decision and interpretation of § 18.2-374 with regard to this single trial, multiple violation situation. This Court has held that even if the crimes are "the same" under *Blockburger,* if it is clear that the state's legislature intended to authorize cumulative punishments a court's review is at an end. *Johnson,* ____ U.S. at ____, 104 S.Ct. at 2541 n.8.

Petitioner maintains that "rental" and not "number of items" should control how many violations of the statute have occurred. Further, it is asserted that the statute is ambiguous with regard to the unit of prosecution and, therefore, ambiguity as to legislative intent must be resolved in favor of Educational Books. (Ptn. 7-12). The Supreme Court of Virginia has rejected petitioner's argument and held that the statutory language shows "unmistakable legislative intent" that each obscene item is a separate entity which may be prosecuted as a separate crime. The court went on to note that § 18.2-373, which describes what constitutes "obscene items" is phrased in the singular, and that such is consistent with the § 18.2-374 prohibitions regarding

various uses of "any obscene item". The provisions of the statute are consistently worded in the singular. *Educational Books,* 228 Va. at ——, 323 S.E.2d at 86. *See* §§ 18.2-372 to 18.2-374.

The rule of lenity advocated by petitioner is not cognizable and is inapplicable in the present case. This "rule" is one of statutory construction and does not present a federal constitutional question. *See* SUP. CT. R. 17; *Barclay* v. *Florida,* 463 U.S. ——, ——, 103 S.Ct. 3418, 3422-3423, *reh. denied,* —— U.S. ——, 104 S.Ct. 209 (1983). Further, this Court has emphasized that the rule of lenity may only be applied when there is statutory ambiguity. It is a rule of statutory construction to be used only to resolve an ambiguity and may not be used to create one. *Albernaz* v. *United States,* 450 U.S. 333, 342-343 (1981); *see Bifulco* v. *United States,* 447 U.S. 381 (1980); *Ladner* v. *United States,* 358 U.S. 169 (1958). Absent clear legislative intent to the contrary, a statute's language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The language of §§ 18.2-373 and 18.2-374, as already determined by the Supreme Court of Virginia, shows clear intent by use of "singular" terms. (Resp. App. 1-2). *Educational Books,* 228 Va. at ——, 323 S.E.2d at 85-86. In light of the principles established by this Court and the language of the statute involved, the rule of lenity does not apply in this case.

The petitioner's case has been reviewed by the Supreme Court of Virginia and affirmed. The court's refusal of the petition for appeal and its finding that there was no reversible error constitutes a decision on the merits. (App. 1). *Jackson* v. *Virginia,* 443 U.S. 307, 311 (1979); *Saunders,* 214 Va. at 702, 204 S.E.2d at 424.

The sole matter set forth in this petition involves inter-

pretation of a Virginia state statute. The question of whether punishments are "multiple" is one of legislative intent since the substantive power to prescribe crimes and determine punishments is vested with the legislature. *Johnson,* ____ U.S. at ____, 104 S.Ct. at 2541. The Supreme Court of Virginia is the final arbiter of Virginia law, and its interpretation of a state statute is binding upon this Court. *Garner,* 368 U.S. at 166. The petition in this case should be denied. The Supreme Court of Virginia has ruled on the merits and affirmed the decision of the lower court. In addition, that court has held that § 18.2-374 provides for multiple punishments in a case so factually similar and legally identical to the instant case that it is certainly dispositive of the issue before this Court. *Educational Books,* 228 Va. ——, 323 S.E.2d 84.

CONCLUSION

The merits of the petitioner's claim have been carefully considered by the Supreme Court of Virginia in the instant case as well as in *Educational Books,* 228 Va. ____, 323 S.E.2d 84. That court correctly applied the well-established legal principles and precedents set forth by this Court, and properly refused to grant Educational Books' petition for appeal.

No constitutional guarantee was violated by the Commonwealth in the instant case. Virginia law was properly applied consistent with the legislative intent made obvious by the wording of the statute at bar. The highest appellate court of the Commonwealth affirmed the lower court's decision, finding separate punishments for multiple violations of § 18.2-374 to be legislatively authorized. The factual situation in the instant case presents no new circumstances warranting review, nor is this Court in a position to develop

a new or different constitutional rule based upon the issue. For the reasons set forth by the Commonwealth, the petition should be denied.

Respectfully submitted,

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Article 5.

Obscenity and Related Offenses.

Section 18.2-372. "Obscene" defined. The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Section 18.2-373. Obscene items enumerated. Obscene items shall include:

(1) Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture, videotape recording; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds.

Section 18.2-374. Production, publication, sale, possession, etc., of obscene items. It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate

commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.